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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR HOFFER, et al.,

Petitioners,

v.

CLASS PLAINTIFFS, et al.,

Respondents,

v.

CITY OF SEATTLE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred in holding that a pending state court class action against the State of Washington which had been certified by the Washington state courts and was within its exclusive jurisdiction could be settled as part of a class action pending in federal district court over the objections of the class representatives and class counsel for the class in the state court action, even though the defendant in the state court action was not a party to the federal action?

2. Whether the Court of Appeals for the Ninth Circuit erred in holding that the District Court had authority to enter an order approving the settlement with the State of Washington and releasing the claims asserted against the State in a pending state court class action even though the State was not a party to the federal class action and the District Court lacked subject matter jurisdiction over it?

3. Whether the Court of Appeals for the Ninth Circuit erred in holding that a State can assert its Eleventh Amendment immunity when claims are asserted against it in federal court, but subsequently consent to federal jurisdiction in the same action for the sole and limited purpose of obtaining an order releasing it from claims being litigated against it in state court?

4. Whether the Court of Appeals for the Ninth Circuit erred in holding that the District Court's entry of an order and judgment settling and releasing the claims pending in a certified state class action against the State of Washington, which was not

a party to the federal class action, over the objections of the class representatives appointed by the state court, violated principles of federalism and comity given, *inter alia*, that the state court's class certification order was a directive that the class's claims against the State could only be litigated or settled in state court and state law provides that a class action can only be settled by order of the state court?

5. Whether the Court of Appeals for the Ninth Circuit erred in holding that the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, authorized the District Court's entry of an order whose practical effect was to bar prosecution of a pending state court class action, even though the State was not a party to the federal class action and no claims had been maintained against it in federal court?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, affirming the order and judgment of the United States District Court for the District of Arizona approving the settlement with the State of Washington and granting it a release is reported in 955 F.2d 1269, and is reprinted as Appendix A, at page A1.[1] (References to the appendices bound with this Petition are styled "A__.") The opinion and order of the United States District Court for the District of Arizona is reported in 720 F. Supp. 1379 and is reprinted as Appendix B at page A60.

JURISDICTION

The decision of the Court of Appeals was entered on February 4, 1992. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 20, 1992. See Appendix C at page A174. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This appeal arises out of the multi-billion dollar default by the Washington Public Power Supply System ("WPPSS") on bonds issued in connection with the construction of two nuclear power facilities (the "WPPSS 4 & 5 bonds"). As a result of this default, various actions were brought against numerous persons and entities in federal court, which were consolidated in *In re Washington Public Power Supply System Securities Litigation* (MDL No. 551) ("*MDL 551*") in the United States District Court for the District of Arizona (the "District Court"). A separate action was brought

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1 A list of the parties is set forth in the caption of Appendix A.

against the State of Washington and certain of its instrumentalities and officials in the state court in Washington.

The Hoffer Class Plaintiffs And The Hoffer Class Action

Petitioners Arthur Hoffer, L.T. Samuels, Norman Benson, John Joseph and Eugene L. Lentzner and Ann Lentzner, as Co-Trustees of the Eugene Lentzner and Ann Lentzner Living Trust (collectively referred to herein as "Petitioners" or the "Hoffer Class Plaintiffs") are the class representatives for WPPSS 4 & 5 bond purchasers in *Hoffer v. State*, No. 84-2-16459-0 (Wash. Super. Ct.) ("*Hoffer*"). They commenced *Hoffer* in November, 1984 in the Superior Court of the State of Washington. On May 22, 1985, *Hoffer* was certified as a class action with respect to the class's claims against the State. Accordingly, the Hoffer Class Plaintiffs were certified as the class representatives authorized to represent the class with respect to its claims against the State. No other persons have sought or obtained authorization to represent the class with respect to any claims against the State.

In *Hoffer*, the Supreme Court of the State of Washington in a landmark decision sustained the legal validity of eight causes of action alleged in *Hoffer*. (*Hoffer v. State*, 110 Wash. 2d 415, 755 P.2d 781 (1988), *aff'd on reh'g*, 113 Wash. 2d 148, 776 P.2d 963 (1989)). These claims include: (i) common law fraud; (ii) violations of the Washington State Securities Act; (iii) negligent misrepresentation; and (iv) tortious interference with a business expectancy. *Id.* *Hoffer* has been remanded and is now pending in Superior Court. The Hoffer Class Plaintiffs seek damages of over two billion dollars against the State.

The Federal Class Plaintiffs Are Only Authorized To Represent The Class With Respect To Its Claims Against The Defendants In *MDL 551*

The class plaintiffs in *MDL 551* (the "Federal Class Plaintiffs") are the designated representatives of the class with respect to its claims against the defendants in *MDL 551*, and are only authorized to prosecute the claims asserted against the defendants in *MDL 551*.

On or about November 30, 1983, the District Court conditionally certified a class of persons who purchased WPPSS 4 & 5 bonds during the period March 1, 1977 through January 22, 1982 to pursue the federal law claims asserted in the complaints. Each time the Federal Class Plaintiffs thereafter sought to add claims or parties in *MDL 551* (which they did on several occasions) and extend the scope of their representation of the class, they moved for an order for class certification of such claims. The Federal Class Plaintiffs never sought any authorization to certify any claims against the State, not even for purposes of settlement.

The Settlement With The State In *MDL 551*

In 1989, the Federal Class Plaintiffs entered into settlements with the remaining defendants in *MDL 551*, including several utilities in Washington (the "WPUG defendants"). Settlements had been entered into with other defendants earlier in the action. The total amount of all settlements with the defendants in *MDL 551* was $747 million.

During the settlement discussions, counsel for the WPUG defendants agreed with counsel for the Federal Class Plaintiffs ("Federal Class Counsel") to a figure which would be acceptable for all of the WPUG defendants. The total figure which Federal Class Counsel informed counsel for the WPUG defendants would be acceptable was $275 million. In response to their inquiry, lead counsel for the WPUG defendants was informed that Federal Class Counsel did not care how the total figure was obtained. In fact, unbeknownst to Federal Class Counsel, lead counsel for the WPUG defendants had secretly obtained a $10 million commitment from the State, an ally of the WPUG defendants. They had also obtained $35 million from the Bonneville Power Administration. The Bonneville Power Administration had been a defendant in *MDL 551*, but all of the class's claims against it in *MDL 551* had previously been dismissed with prejudice.

The settlement with the State (sometimes referred to herein as the "State Settlement") was not the product of arm's length negotiations. Indeed, it was not the product of any negotiations at all. Federal Class Counsel had no settlement discussions or negotiations whatsoever with the State. Indeed, neither Federal Class Counsel nor counsel for the WPUG defendants *even requested* that the State pay more than $10 million for the release.

The Hoffer Class Plaintiffs and their counsel ("Hoffer Class Counsel") were totally excluded from the settlement process. Indeed, they were not even notified of the State Settlement until after a settlement agreement between the parties had been executed. After they learned of the State Settlement, Hoffer Class

Counsel notified the participants that they objected to it and considered it to be unauthorized and unfair.

A fairness hearing on the settlements was held by the District Court on April 11, 1989. In its decision approving all of the settlements, the District Court rejected all of the Hoffer Class Plaintiffs' objections to the State Settlement.[2] In addition to approving the State Settlement, the District Court's order and final judgment provides that the class "shall conclusively be deemed to have released" the State from all claims. (A171-72).[3] The District Court also approved all other settlements in *MDL 551*.

The $10 million settlement with the State is severable from the balance of the settlements with the defendants in *MDL 551*. Accordingly, rejection of the settlement with the State would have no effect on the balance of the settlements; it would merely permit the claims against the State to be litigated or settled in the pending certified state court class action against it.

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2 In addition to the objections set forth in this Petition, the Hoffer Class Plaintiffs objected to the State Settlement before the District Court and the Ninth Circuit on the grounds that the settlement process was fatally flawed and the Settlement was unfair and inadequate. The Hoffer Class Plaintiffs did not object to any of the other settlements.

3 That portion of the order and final judgment which the Hoffer Class Plaintiffs have appealed from is reprinted as part of Appendix B.

The State's Failure To Waive
Its Eleventh Amendment Immunity

In 1986, a claim was asserted against the State by Bernard Chiert in *MDL 551* (sometimes referred to herein as the "Chiert Action"). On April 16, 1986, the State moved to dismiss such claim on the grounds, *inter alia*, that it was barred by the Eleventh Amendment. Based on the State's assertion of its Eleventh Amendment immunity, that action was dismissed for lack of jurisdiction.

The settlement agreement with the State does not provide that the State is waiving its Eleventh Amendment immunity. After the Hoffer Class Plaintiffs objected to the State Settlement on the grounds, *inter alia*, that the District Court lacked jurisdiction over the State, the State responded by unequivocally stating that it had not "generally appeared" and was not consenting to jurisdiction in federal court except for the limited purpose of approval of the proposed settlement and entry of a release in its favor.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit (sometimes referred to herein as the "Decision") is unprecedented. If permitted to stand, it will wreak havoc on the most basic principles of class action representation and federalism. The Ninth Circuit itself recognized that the *Hoffer* appeal "present[ed] fundamental questions of first impression involving the extent to which a plaintiff class in a federal action can settle claims that have not been alleged in the complaint and that are pending in a state court as part of a certified class action". (A37). However, it decided this weighty issue of

national importance incorrectly, and its decision conflicts with those rendered by other United States courts of appeal.

The decision of the Ninth Circuit is the first and only decision which authorizes class representatives to settle claims against persons who are *not parties* to the class action and as to whom they have not been authorized to represent the class. Even worse, it found that such authority existed even where a state court class action is pending against that non-party in which different class representatives had been certified by the state court as the exclusive representative of the class and the federal court lacked subject matter jurisdiction over that non-party.

The Ninth Circuit's ruling emasculates the certification process in class actions and creates a dangerous precedent. It confers blanket authority for any class representative to settle a claim against a non-party even where, as here, a separate certified class action is being litigated by other class representatives against that person. For instance, in any case where claims against different entities must be litigated in a particular court or jurisdiction and two certified class actions are proceeding, the class representative in either action may unilaterally settle the other action.

The Decision also authorizes the class plaintiffs in any multi-defendant class action to settle claims against culpable persons whom they have not named as defendants. Thus, in a case involving an industry-wide price-fixing or other antitrust conspiracy, if the class representatives have sued four of ten persons who have engaged in price-fixing or other antitrust conspiracy, they would nevertheless be authorized to release claims

against all other culpable persons even though they were not defendants in the action. The same blanket authority to release claims against culpable non-parties would exist in every major corporate-securities fraud dispute or mass tort-disaster litigation. And it would not matter that a certified class action was being litigated in state court under state law against persons who were never parties to the federal action.

The Decision also flagrantly violates fundamental principals of federalism and comity and represents a dangerous intrusion by a federal court over the jurisdiction of the state courts. The claims against the State were pending in a state court class action in which the state court had issued a class certification order. By issuing that order, the state court directed that the class's claims against the State could only be litigated or settled before it and that only the Hoffer Class Plaintiffs were authorized to litigate or settle them. State law mandates that a class action can only be settled by approval of the state court.

The federal courts had no basis to displace the state court's jurisdiction over a certified state court class action properly before it. The State was not a party to *MDL 551* and the Federal Class Plaintiffs never sought to assert, much less certify any claims against the State. Indeed, the federal court lacked jurisdiction over the claims against the State; when a claim was actually asserted against the State in *MDL 551*, it was dismissed for lack of subject matter jurisdiction.

ARGUMENT

I.

THE DISTRICT COURT LACKED AUTHORITY TO ENTER AN ORDER SETTLING AND RELEASING THE CLAIMS AGAINST THE STATE

A. The Ninth Circuit's Decision Contravenes Basic Principles Of Class Representation

The Ninth Circuit's ruling that a class plaintiff has authority to settle and release claims against *a non-party* to the federal class action and can do so even though different class representatives have been authorized to represent the class with respect to its claims against such person in a certified class action pending in state court is unprecedented.

The conclusion that the Federal Class Plaintiffs have authority to settle the claims asserted against the State in *Hoffer* over the objection of the Hoffer Class Plaintiffs renders totally meaningless court certification of a class and its representatives and runs roughshod over these fundamental underpinnings of class representation. In fact, having failed to opt out of the Hoffer Class, the Federal Class Plaintiffs lack authority to settle even their *individual* claims against the State. It would be ludicrous if they could nevertheless settle the *class's* claims against the State. The Ninth Circuit's ruling is also necessarily a determination that the Hoffer Class Plaintiffs could have settled *MDL 551* at any time over the objections of the Federal Class Plaintiffs.

The Ninth Circuit's ruling on the scope of authority of class representatives is in conflict with rulings of the Second Circuit Court of Appeals. While the precise issue before the Second Circuit was different, its holding as to the scope of authority of class representatives in federal class actions conflicts with that reached by the Ninth Circuit.

In *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981) ("*Super Spuds*"), the Second Circuit ruled that the federal class representatives in that action did not have authority to enter into a settlement releasing claims against the defendants which were not asserted in the federal class action, but which were subsequently asserted by a different class member in a state court action.

The Second Circuit found that the class plaintiffs in a federal class action only are authorized to represent members of the class with respect to claims within the scope of the certification order, and have no authority to settle other claims:

> The named plaintiffs were authorized to represent other members of the class solely with respect to liquidated contracts. They were never authorized to represent such members with respect to unliquidated contracts. Having received authority to represent class members solely with respect to liquidated contracts, plaintiffs had no power to release any claims based on any other contracts.

Id. at 17.

The Second Circuit also concluded, in reasoning which is equally applicable here, that:

> If the case had proceeded to trial and a judgment had been entered in favor of the defendants, that judgment would have barred all members of the class who had not opted out from bringing any claim based on contracts they liquidated. Such a judgment would *not* have barred members of the class from bringing any other claim they might be able to assert against the defendants, including claims based on contracts unliquidated at the close of trading on May 7.
>
> If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.

Id. at 17-18 (emphasis in original).

The reasons why the Federal Class Plaintiffs lack authority to settle the claims asserted in *Hoffer*, while somewhat different than in *Super Spuds*, are far more compelling than in that case. Like in *Super Spuds*, the orders granting class certification in *MDL 551* do not authorize the Federal Class Plaintiffs to represent the class with respect to such claims, and the Federal Class Plaintiffs, like the class plaintiffs in *Super Spuds*, never sought such authority.

However, unlike *Super Spuds*, in this case: (i) the entity released was not a defendant in the federal action; (ii) different class representatives had been certified by a state court to represent the class with respect to its claims against such entity in a certified state court class action,[4] and (iii) the federal court lacked subject matter jurisdiction over such entity and the claims asserted against it.

The general test articulated by the Second Circuit in *Super Spuds* for analyzing the scope of authority of class representatives is indisputably not met here: a class representative has no authority to settle a claim on behalf of the class where, as here, the claim would not be barred by a judgment in the action under principles of *res judicata*.

The Second Circuit's decision in *Dunlop v. Pan Am. World Airways*, 672 F.2d 1044 (2d Cir. 1982) also conflicts with the Ninth Circuit's Decision. In that case, the Second Circuit found that the Secretary of Labor lacked authority to settle state common law claims of class members because the statute pursuant to which he was authorized to represent the class only authorized him to represent them with respect to federal statutory claims. *Id.* at 1049-51 & n.7.

Thus, while the Secretary was authorized to represent all members of the class, the Second Circuit found that the scope of his authority to represent such class members was circumscribed

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4 In *Super Spuds*, the action brought by the class member who objected to the settlement had not yet been *certified* as a class action.

by statute. Here, the Federal Class Plaintiffs have only been judicially authorized to represent the class with respect to its claims against the defendants in *MDL 551*, and the Hoffer Class Plaintiffs are the only persons who have been judicially authorized (by the only court with jurisdiction over such claims) to represent the class with respect to its claims against the State.

The Ninth Circuit's decision is also in conflict with the decision in *Tate v. Werner*, 393 F. Supp. 1318 (E.D. Pa. 1975), *aff'd*, 538 F.2d 320 (3d Cir.), *aff'd sub nom. Appeal of Zapata*, 538 F.2d 322 (3d Cir. 1976). There, a class action was brought in federal court by prison inmates against a correctional institution asserting violations of their civil rights under 42 U.S.C. § 1983. The federal class plaintiffs also alleged that the prison's law library facilities were inadequate. However, a class action asserting that claim had been brought by different class representatives against in state court in Pennsylvania. The state court had certified it as a class action. The court in *Tate* concluded that the class's claim relating to adequacy of the law library should not be considered by the federal district court, since the same issue had previously been raised in the state court action. The *Tate* court concluded that:

> [B]oth comity, and effective judicial administration dictate that we defer decision as to those aspects of a case which are now the subject of a class action previously filed; *see* Rule 23(b)(1). *Any contrary holding would distort the purpose and plain meaning of Rule 23(b)(1) governing class actions.*

Id. at 1319 (emphasis added).

Accordingly, the court in *Tate* concluded that it should not consider a claim that was being maintained in a certified state court class action, and that basic rules of class action representation dictated such a result.

The Ninth Circuit's ruling that the District Court had authority to enter an order settling and releasing the class' claims against the State also conflicts with the Seventh Circuit Court of Appeals' decision in *In Re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir., *cert. denied*, 444 U.S. 870 (1979). In that case, the Seventh Circuit concluded that since the district court had actually declined to exercise pendent jurisdiction over the state law claims against the defendant in the federal class action when it issued its class certification order, it was without authority to later settle or release such claims.[5] The Seventh Circuit reasoned that:

> A fundamental characteristic of the federal courts is their limited jurisdiction. In the same pretrial order in which the trial court certified the class, it also expressly declined to take pendent jurisdiction over the state claims presented by the pleadings. Therefore GM's contention that the settlement was more favorable than federal law requires presumably because the trial court could have forced subclass members to accept the settlement

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5 See, *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D. Colo. 1989) (district court in federal class action was without power to extinguish independently viable state law claims possessed by non-settling defendants against settling defendants).

> package in return for all state and federal claims is without merit. *The trial court, having declined jurisdiction over the state claims, was without power to extinguish them.* The form of settlement with its unusual use of individual releases was apparently agreed to by GM and the Attorneys General in recognition of the federal court's inability to settle the state claims of subclass members. The opt-out provision which permits nonconsenting subclass members to pursue state remedies is a necessary consequence of the limited jurisdiction of the federal courts.

Id. at 1134 (footnote omitted)(emphasis added). In *General Motors*, the Seventh Circuit found that the district court lacked power to extinguish state law class against the defendant because it had expressly declined to assert pendent jurisdiction over them. While the issue in *General Motors* is different from this case, a much stronger argument existed there for finding that the district court had power to settle the state law claims since (i) the party released was a defendant in the action and the district court had jurisdiction over it and (ii) a certified class action asserting the state law claims at issue was not pending against it in state court.[6]

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6 Like in *General Motors*, when the class certification order in *MDL 551* was issued and notice sent to the class, no mention was made of any claims against the State. In the *MDL 551* settlement notice, the class had no choice but to accept the settlement as a whole. Accordingly, at the time class members had a right to opt out, no mention was made of the inclusion of any claims against the State. Nevertheless, at the time of the

B. The District Court Lacked Jurisdiction To Enter An Order Releasing The State From The Claims Pending Against It In State Court

1. The State Was Not A Party To *MDL 551*

In finding that the District Court had jurisdiction to approve the State Settlement and enter an order and judgment releasing the State from the claims asserted against it in *Hoffer*, the Ninth Circuit reasoned that it is "elementary that the validity of an order of a federal court depends upon that court's having jurisdiction over the subject matter of the action *and the parties*." (Emphasis added.) (A39). However, it then failed to follow this fundamental rule.

In reaching its conclusion, the Ninth Circuit relied exclusively on cases (see A39) which found that a court can release factually identical claims against *the defendants* in a federal class action (over whom the district court had jurisdiction) even though such claims were not presented and may not have been presentable in the federal action. *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) (factually identical federal securities claims filed by two individuals held barred by settlement of factually identical state law claims against the same defendant in a state court certified class action); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 632 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (settlement of claims asserted against *the defendants* in a federal class action could include a compromise as

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settlement, class members were not afforded the right to opt out of the $10 million State Settlement.

to relief against the defendants not specifically requested in the complaint).

The cases relied on by the Ninth Circuit concern a fundamentally different principle and do not support its conclusion in the present case. In those cases, a federal class action was being litigated against certain defendants. In order to settle the federal class action against *the defendants* in that action, the federal courts concluded that they were empowered to settle factually identical state law claims against the same defendant which were at the core of the federal class action, even if *such claims* had not been asserted and may not have been assertable in the federal class action.[7]

The Ninth Circuit failed to recognize the significance of the State's non-party status. *See Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D. Colo. 1989) (district court lacked power to extinguish contribution claims by non-parties against settling defendants' in federal class action); *cf. Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989) (fundamental

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7 The rule articulated in the cases relied on by the Ninth Circuit, unlike the present case, is warranted in order to protect the federal court's jurisdiction. For instance, a defendant in a federal class action involving federal antitrust claims cannot settle such action if factually identical state law antitrust claims will be litigated *against it* in state court. This rule has no application where, as here, the party to the settlement is not a defendant in the federal class action (*i.e.*, no claims are pending against it in federal court), much less where a certified class action is pending against that non-party in state court.

due process principles prohibit claim extinguishment against anyone not a party to an action); *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982) (bankruptcy court lacks jurisdiction to release claims against non-parties, even if creditors approve of the plan authorizing such release).

The Ninth Circuit also ignored that in no case relied on by it was a certified class action concerning the claims released being litigated in state court. The Ninth Circuit totally failed to address these critical distinctions between the cases it relied on and the present case.

In short, no case relied on by the Ninth Circuit (or the District Court) remotely supports the proposition that a federal court has power to enter an order settling or releasing claims against a non-party to a federal class action, much less where different class representatives are prosecuting claims against such person in a certified state court class action.

2. The Federal Court Lacked Subject Matter Jurisdiction Over The State

Not only was the State not a party to *MDL 551*, there was no basis for subject matter jurisdiction over it. Only state law claims had been asserted against the State in *Hoffer*, and diversity jurisdiction was lacking. However, even if a basis for jurisdiction against the State had existed, the State had affirmatively asserted its Eleventh Amendment immunity in *MDL 551* objecting to the assertion of federal jurisdiction over it.

a. The District Court Lacked Jurisdiction Over the State Under the Eleventh Amendment

The Ninth Circuit agreed with the District Court that the State could selectively waive its Eleventh Amendment immunity for the sole and limited purpose of obtaining an order from the federal court approving a settlement and releasing it from liability notwithstanding that (i) such claims were being litigated against it in a certified state court class action and (ii) the State had previously asserted its Eleventh Amendment immunity in *MDL 551* to preclude the assertion of claims against it.

The State expressly stated that (i) it was *only* consenting to federal jurisdiction for the sole and limited purpose of approving the proposed settlement and granting an order releasing it from liability for the claims asserted against it in *Hoffer* and (ii) that it was *not* consenting to federal jurisdiction to adjudicate any claims against it if the proposed settlement was not approved by the District Court.

Moreover, when a claim actually was interposed against the State in *MDL 551* in 1986, it raised its Eleventh Amendment immunity as a defense to that claim; consequently, that action was dismissed for lack of subject matter jurisdiction.

While a State, as the Ninth Circuit noted, may waive its Eleventh Amendment immunity by expressly consenting *to suit* in federal court in a particular action, the State admittedly did not do so in the case at bar. The time for the State to have so consented if it wished for the federal court to preside over the adjudication

or settlement of *Hoffer* was prior to the entry of the certification order in *Hoffer*. Such claims could then have been litigated (or ultimately settled) in federal court. The State did not avail itself of this option. It was only after unfavorable decisions were rendered against it in *Hoffer* by the Washington Supreme Court that the State decided to selectively waive its Eleventh Amendment immunity for the sole purpose of obtaining a release from such claims.

The unfairness of such a selective exercise of a State's Eleventh Amendment rights is striking; the dangers of judicial countenance of it are alarming. If the Ninth Circuit is correct, then a State can refuse to waive its Eleventh Amendment immunity from suit in federal court when claims are lodged against it. It can also selectively assert its immunity as a shield in a federal action to obtain dismissal of claims asserted against it on jurisdictional grounds, but later consent in the very same action to federal jurisdiction for the sole purpose of obtaining a release of claims being litigated against it in state court.

It is respectfully submitted that this "heads I win, tails you lose" approach to Eleventh Amendment immunity is fundamentally unfair, and should be addressed and rejected by this Court. The Ninth Circuit's conclusion is in conflict with the reasoning of the court in *Hospital Ass'n v. Toia*, 435 F. Supp. 819, 827 (S.D.N.Y. 1977) which agreed that a state should be prohibited from engaging in such a self-serving use of its Eleventh Amendment immunity in the same action. In that case, the court stated that "[w]e would agree that a state ordinarily ought not be permitted to waive its immunity to suit -- for example in the hope of securing a favorable verdict -- and withdraw its consent to be sued if it loses the case."

What the Ninth Circuit validated in this case involves the same concerns.

The Ninth Circuit's conclusion that it could assert jurisdiction over the State solely for purposes of extinguishing the class's claims against it notwithstanding the State's prior assertion of its Eleventh Amendment immunity in the same action is also at odds with the conclusion reached by the Seventh Circuit Court of Appeals in *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1135 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). While that case did not involve an Eleventh Amendment question, its application of jurisdictional principles to court approved settlements of state law claims in a federal class action is highly pertinent here.

As discussed above, the district court in that case had expressly declined to exercise pendent jurisdiction over the class's state law claims against the defendant at the time it issued its class certification order. The Seventh Circuit concluded that having expressly declined to exercise pendent jurisdiction over the class's state law claims in the certification order, the district court was without power to later settle or release them. *Id.* at 1134. Likewise, having found that it lacked jurisdiction over the State under the Eleventh Amendment in declining to permit the assertion of claims against it in *MDL 551*, the District Court was without power to later enter an order and judgment in the same action releasing the State from other claims asserted against it by class members.

b. Even if the State had Waived its Eleventh Amendment Immunity, Jurisdiction Over it Would Still be Lacking

The Ninth Circuit's conclusion that the District Court had jurisdiction to enter an order releasing the State is also insupportable under the doctrine of pendent party jurisdiction. In *Finley v. United States*, 490 U.S. 545 (1989), this Court held that there must be an independent basis of federal subject matter jurisdiction as to each defendant in an action and that there is no pendent party jurisdiction unless Congress has affirmatively granted such jurisdiction. *Id.* at 574.

It is not disputed that no such basis for jurisdiction exists over the State in *MDL 551*. While the Judicial Improvements Act of 1990, 28 U.S.C. § 1367 (Supp. 1992), creates discretionary pendent party jurisdiction for cases commenced after December 1, 1990, the holding of *Finley* applies to this case.

The Ninth Circuit's ruling on jurisdiction with respect to court approved settlements in actions commenced prior to December 1, 1990, directly conflicts with the decision of the Eighth Circuit Court of Appeals in *Alumax Mill Prods. v. Congress Fin. Corp.*, 912 F.2d 996 (8th Cir. 1990). In that case, the Eighth Circuit ruled that there must be an independent basis of federal jurisdiction over a party in order for a district court to enter an order approving a settlement as to it.

The Eighth Circuit found that the district court lacked jurisdiction to enter an order approving a settlement as to a

defendant in the action against whom only state law claims had been asserted, since the district court lacked jurisdiction over it. The Eighth Circuit concluded that the fact that factually related federal RICO claims had been asserted against the other defendant in the action did not provide the necessary jurisdictional predicate for the district court's approval of the settlement, since an independent basis of jurisdiction was needed for each defendant. *Id.* at 1007.

However, even assuming that this action had been commenced after December 1, 1990 (and assuming that the State had waived its Eleventh Amendment immunity to suit in federal court), there would still be no basis whatsoever for exercising pendent party jurisdiction here. The State was never made *a party* in *MDL 551*, not even for purposes of certifying a settlement class. It follows *a fortiori* that pendent party jurisdiction cannot exist absent joinder of the State as a party.

In short, the District Court lacked jurisdiction to enter an order and judgment approving the settlement and releasing the State from the claims asserted against it in *Hoffer*.

II.

THE FEDERAL COURT'S ISSUANCE OF AN ORDER RELEASING THE STATE FROM CLAIMS BEING LITIGATED AGAINST IT IN A CERTIFIED STATE COURT CLASS ACTION FLAGRANTLY VIOLATES BASIC PRINCIPLES OF FEDERALISM AND COMITY

By issuing an order certifying the class's claims against the State in *Hoffer*, the state court directed that the class's claims against the State could only be litigated or settled before it and that only the Hoffer Class Plaintiffs were authorized to litigate or settle such claims on behalf of the class. Subsequently, the Supreme Court of Washington issued landmark opinions under state law legally validating the claims asserted against the State in *Hoffer*, 110 Wash. 2d 415, 755 P.2d 781 (1988), *aff'd on reh'g*, 113 Wash. 2d 148, 776 P.2d 963 (1989). Notwithstanding the pendency of this certified state court class action, the District Court entered an order releasing the State, a non-party to the federal action, from all of the claims pending against it in *Hoffer*.

The federal court's order flagrantly interferes with the state court's jurisdiction over a class action within its exclusive jurisdiction. If the Ninth Circuit's Decision is not overturned by this Court, it will provide broad based authority for interference by the federal courts with state court proceedings.

The Ninth Circuit found that the District Court's approval of the State Settlement and its entry of an order and judgment releasing the State from the claims asserted against it in *Hoffer* "in no way interfered with or intruded into the authority of the

Washington state courts." (A44). The basis for the Ninth Circuit's conclusion was that the "district court did not adjudicate the claims [in *Hoffer*] on the merits." *Id.*

However, what the District Court did was equally or even more intrusive: it entered an order and judgment directing that the State be released from the claims asserted in *Hoffer* even though a certified state court class action against the State was pending in state court. It thereby interfered with the state court's certification order, which directed that it was the only forum for the adjudication or settlement of the class's claims against the State. State law provides that a class action can only be settled with the approval of the state court. Wash. Ct. C.R. 23(e).[8] The federal courts have applied principles of comity to proscribe interference with a state court proceeding in far less compelling circumstances.

For instance, in *Tate v. Werner*, 393 F. Supp. 1318 (E.D. Pa. 1975), *aff'd*, 538 F.2d 320 (3d Cir.), *aff'd sub nom. Appeal of Zapata*, 538 F.2d 322 (3d Cir. 1976), the district court was presiding over a class action against a correctional facility alleging violations of inmates' constitutional rights under 42 U.S.C. § 1983. The federal class plaintiffs also claimed that the law library at the prison was inadequate. A class action had been

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8 Wash. Ct. C.R. 23(e) provides:

> **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

brought by different class plaintiffs in state court asserting the inmates' claim that the prison's law library facilities were inadequate. The state court issued a class certification order in that case. The district court rejected the federal class plaintiffs' request that it determine their claim concerning the adequacy of the prison's law library, concluding that "both comity, and effective judicial administration dictate that we defer decision as to those aspects of a case which are now the subject of a [state court] class action previously filed; . . . ." *Id.* at 1319.

Similarly, in *Clayton v. Skelly Oil Co.* [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,562, at 94,350 (S.D.N.Y. Sept. 25, 1978), the district court denied class certification in an action brought in state court because the court found that "[c]lass certification should be denied where the effect of such action would be to undercut a parallel state proceeding which is entitled to precedence." In that case, the court found that the state court action was entitled to precedence because, *inter alia*, class certification had previously been granted in a state court action which concerned issues of state corporate law. *See In Re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988) (district court's mandatory class certification order in asbestos action disregarded principles of comity and federalism given pendency of state actions).

The federal courts have also recognized that comity dictates that a court should not interfere with a proceeding pending in a foreign court where, as here, that court lacks jurisdiction to adjudicate the underlying controversy. For instance, in *Laker Airways Ltd. v. Pan Am. World Airways*, 577 F. Supp. 348, 353 (D.D.C. 1983), a British-based air carrier brought an action against various air carriers (principally foreign carriers) alleging

violations of the United States antitrust laws. Certain of the defendant air carriers then obtained an order from a British tribunal directing the plaintiff to cease prosecuting its action in the United States federal court against any of the British carriers (and two other foreign carriers). The United States District Court held that the British tribunal's order was improper, concluding that a foreign court which lacks jurisdiction over the underlying controversy, had no valid basis for displacing the decision-making authority of the federal courts with regard to violations of federal law. *Id.* at 353.

The same reasoning is precisely applicable here with respect to the proper authority of federal and state courts. No claims had been asserted against the State in *MDL 551* and the federal court lacked power to adjudicate any claims against the State. The District Court had no basis to displace the jurisdiction of the state court, before whom a certified class action litigating such claims against the State was pending.

III.

THE DISTRICT COURT'S GRANT OF AN ORDER RELEASING THE STATE VIOLATES THE ANTI-INJUNCTION ACT

The District Court's entry of an order releasing the State from the claims asserted in *Hoffer* violates the Anti-Injunction Act, 28 U.S.C. § 2283. The Anti-Injunction Act, 28 U.S.C. § 2283

(1978) provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Ninth Circuit agreed that the Anti-Injunction Act was applicable, but found that "the relitigation exception to the Anti-Injunction Act allows a federal court to enjoin a state court proceeding to protect or effectuate its judgment." (A43). In finding the District Court's order to be justified by the "relitigation" exception, the Ninth Circuit misapplied that exception, and adopted a bootstrapping approach which ignores the precedents of this Court.

The purpose of the relitigation exception to the Anti-Injunction Act, as the name suggests, is to bar *re*litigation of claims that have previously *been litigated* in federal court, not to allow a non-party against whom a state court action is pending to obtain a release in federal court to preclude further prosecution in state court of claims which were not and could not have been interposed in federal court.

In *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 150 (1988), this Court explained that the "relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Id.* at 147. Accordingly, "an essential prerequisite for applying the

relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.* at 148.

In applying this Court's explication of the relitigation exception in *Chick Kam Choo*, the Second Circuit Court of Appeals in *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638 (2d Cir. 1989) concluded that in order for this narrow exception to apply, the claim at issue had to have been litigated in the federal action and that the parties to the federal and state action must have been the same (*i.e.*, the relitigation exception does not bar the prosecution of claims against a person who was not a defendant in the federal action). *Id.* at 642-43. Thus, the Ninth Circuit's application of the "relitigation" exception is directly at odds with this Court's holdings and application of them by other United States courts of appeal.

In the present case, since the State was not a party to *MDL 551*, the relitigation exception has no application whatsoever. It is the release itself -- the very order which violates the Anti-Injunction Act -- which was the sole basis for the District Court and the Ninth Circuit to rely on the relitigation exception to the Anti-Injunction Act. In short, the Ninth Circuit's ruling serves not to protect the federal court's jurisdiction, but to divest a state court of its exclusive jurisdiction.

CONCLUSION

For the reasons set forth above, this Court should grant the Petition For Certiorari.

Respectfully submitted,

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